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STATE OF NEW MEXICO DEPARTMENT OF GAME & FISH

One Wildlife Way
Post Office Box 25112
Santa Fe, NM 87504
Phone (505) 416-8008
Fax (505) 476-8124

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APR 02 2007

March 23, 2007

Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: WT Docket No. 03-187, FCC 06-164, NOI Migratory Bird Proposed Rule; NMGF Project No. 11275

Dear Federal Communications Commission:

In response to the extended comment period for this Notice of Proposed Rulemaking, the New Mexico Department of Game & Fish (NMGF) has reviewed the above referenced document. Human activities cause an unknown portion of total avian mortalities. Approximately two thirds of human-caused mortalities result from collision with buildings. Communication towers are among an array of factors contributing to the remaining third of human-caused mortality. Studies have shown that communication tower impacts are greatest on night-migrating passerines. In the face of declining populations of many neotropical migrant species, and documented mortality to some FWS listed and Species of Conservation Concern, a concerted effort to reduce human-caused mortality from all sources is warranted. Such an effort on the part of Federal agencies with project licensing authority is a component of full compliance with the Migratory Bird Conservation Act and the National Environmental Policy Act (NEPA), as well as being consistent with acting in the public interest. Therefore NMGF supports FCC adoption of rules to mitigate communication tower impact on migratory birds.

The United States Department of Interior Fish & Wildlife Service (FWS) has submitted extensive comments on this docket, dated February 2, 2007. The FWS comments include a detailed scientific literature review, legal framework analysis and specific technical recommendations. NMGF knows of no substantial additions to the FWS literature review. We concur with and express our support for the FWS recommendations. At present, the published research is insufficient to quantitatively document the precise extent of population impacts, or the precise effectiveness of particular mitigation measures. Nevertheless, the preponderance of evidence to date strongly supports certain conclusions. If it is not feasible to adopt all of the FWS recommendations, we recommend the following as minimum components of a rule:

1. Do not allow any steady burning aviation warning lights, alone or in combination with other types. Blinking or strobe lights of any color are **less** hazardous to migrating birds. Ground facilities should be lit only if necessity can be documented for a particular site, and necessary ground facility lights should be down-shielded.
2. Prohibit guyed construction for any new or reconstructed towers, except where documentation is provided showing no other construction is feasible. If and when future research demonstrates effectiveness of guy wire marking devices, those devices should then be required for all guyed towers.

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3. Minimize tower height to the extent feasible. In most cases, an increase in the number of towers, or the total footprint of a tower project, is preferable to greater height.
4. Implement a screening process to identify those towers (taller, lighted, guyed, located in areas of frequent low-visibility weather, concentrated migratory pathways, important habitat or listed species range) for which further NEPA analysis and mitigation may be needed.

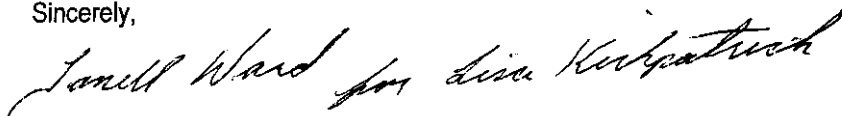
Most research on this hazard has been done in the eastern states. We are aware of only one communication tower/bird mortality study that took place in the state of New Mexico (Ginter, D.L. and Desmond, M.J. 2004. Avian Mortality During 2001 Migration at Communication Towers Along the Rio Grande Corridor in Southern New Mexico. Southwestern Naturalist 49(3) p 414-417). Although the study was conducted during fall migration in a known migration pathway (the Rio Grande valley), very little mortality was documented. The authors hypothesize that the lack of significant mortality was due to lack of fog and other poor visibility weather phenomena in their study area. However New Mexico has a growing population and increasing density of communication towers, and many mountainous regions subject to all variety of weather conditions. Remembering that "absence of evidence does not constitute evidence of absence" (of an effect), it is appropriate to assume that effects which have been documented elsewhere occur here too, unless demonstrated otherwise. Such demonstration might be made through a program of mortality monitoring at a statistically representative sample of towers in the state. Please find enclosed a list of night-migrating passerine bird species which are either FWS listed under the Endangered Species Act, listed by the New Mexico Wildlife Conservation Act as Threatened or Endangered, or which are considered sensitive by NMGF biological staff. These birds may be particularly vulnerable to adverse population level impacts from tower development.

We further recommend that NEPA analysis be conducted on the cumulative and individual project effects of communication towers on the lesser prairie chicken (*Tympanuchus pallidicinctus*). Lesser prairie chicken is a grouse inhabiting the prairies of eastern New Mexico. It is considered sensitive by NMGF and has been identified as a candidate for FWS Threatened listing. Studies have shown that prairie grouse avoid using, and abandon breeding and nesting sites, in the vicinity of tall structures.

Almost nothing is known about the possible effect of communication towers on bats. There are two FWS endangered bat species in New Mexico, and NMGF lists a number of bat species as sensitive, primarily because so little is known about their population status and any threats that may exist. NEPA could be used to fill this gap in available knowledge.

Thank you for the opportunity to comment on this Proposed Rule. In summary, NMGF recommends that the rule be promulgated, and that it include all recommendations made by the FWS in their February 2 letter. We identify elements that should be minimal essential provisions of the rule in the event that FCC cannot implement all of the FWS recommendations, and briefly discuss potential impacts specific to New Mexico. If there are any questions, please contact Rachel Jankowitz at 505-476-8159, or rjankowitz@state.nm.us.

Sincerely,



Lisa Kirkpatrick, Chief
Conservation Services Division

cc: Ecological Services Field Supervisor, USFWS
Mark Olson, NW Area Habitat Specialist, NMGF
Scott Draney, NE Area Habitat Specialist, NMGF
Pat Mathis, SW Area Habitat Specialist, NMGF
George Farmer, SE Area Habitat Specialist, NMGF

NEW MEXICO NIGHT-MIGRATING PASSERINES OF CONCERN FOR COMMUNICATION TOWER IMPACTS

For complete up-dated information on federal-listed species, including plants, see the US Fish & Wildlife Service NM Ecological Services Field Office website at <http://www.fws.gov/newmexico/SBC.cfm>. For information on state-listed plants, contact the NM Energy, Minerals and Natural Resources Department, Division of Forestry, or go to <http://nmrareplants.unm.edu/>. If your project is on Bureau of Land Management, contact the local BLM Field Office for information on species of particular concern. If your project is on a National Forest, contact the Forest Supervisor's office for species information.

<u>Common Name</u>	<u>Scientific Name</u>	<u>NMGF</u>	<u>USFWS</u>	<u>critical habitat</u>
Mountain Plover	Charadrius montanus	s	SOC	
Yellow-billed Cuckoo	Coccyzus americanus	s	C	
Southwestern Willow Flycatcher	Empidonax traillii extimus	E	E	Y
Bell's Vireo	Vireo bellii	T	SOC	
Gray Vireo	Vireo vicinior	T		
Botteri's Sparrow	Aimophila botterii	s		
Baird's Sparrow	Ammodramus bairdii	T	SOC	
Arizona Grasshopper Sparrow	Ammodramus savannarum ammodramus	E		
Varied Bunting	Passerina versicolor	T		